(8)

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 03-107

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

BILLY JO LARA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* ON BEHALF OF EIGHTEEN AMERICAN INDIAN TRIBES

TRACY LABIN *
RICHARD GUEST
NATIVE AMERICAN RIGHTS FUND
1712 N STREET, N.W.
WASHINGTON, DC 20036
(202) 785-4166

CHARLES A. HOBBS
ELLIOTT A. MILHOLLIN
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W.
Washington, D.C. 20037
(202) 822-8282

Counsel for Amici Lac Courte Oreilles Tribe, Menominee Tribe, Metlakatla Indian Community, Mississippi Band of Choctaw Indians, Oglala Sioux Tribe, Three Affiliated Tribes of the Fort Berthold Reservation

* Counsel of Record for *Amici Curiae*

November 14, 2003

[All *Amici* Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

38

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION OF MONTANA,
CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,
EASTERN BAND OF CHEROKEE INDIANS OF NORTH CAROLINA,
LAC COURTE OREILLES TRIBE OF WISCONSIN
LUMMI NATION OF WASHINGTON
MENOMINEE TRIBE OF WISCONSIN,
METLAKATLA INDIAN COMMUNITY OF ALASKA,
MISSISSIPPI BAND OF CHOCTAW INDIANS,
MOHEGAN TRIBE OF CONNECTICUT,
NEZ PERCE TRIBE OF IDAHO,
OGLALA SIOUX TRIBE OF SOUTH DAKOTA,
PASCUA YAQUI TRIBE OF ARIZONA,
PAWNEE NATION OF OKLAHOMA,
PUEBLO OF LAGUNA OF NEW MEXICO,
PUEBLO OF SANTA CLARA OF NEW MEXICO,
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF ARIZONA,
SPIRIT LAKE SIOUX TRIBE OF SOUTH DAKOTA
THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION OF NORTH DAKOTA

QUESTION PRESENTED

Whether Section 1301 of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, as amended, validly recognizes and affirms the Tribes' inherent sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for an offense with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. SECTION 1301 OF THE INDIAN CIVIL RIGHTS ACT PROPERLY RECOGNIZES THAT INDIAN TRIBES ARE THE LAWFUL AND MOST APPROPRIATE AUTHORITIES TO HANDLE MISDEMEANOR OFFENSES COMMITTED BY ALL INDIANS ON THEIR RESERVATIONS	4
A. The Facts of This Case Demonstrate Why The Spirit Lake Tribe Needs to Exercise Inherent Criminal Jurisdiction Over All Indians Who Commit Misdemeanors on Its Reservation	4
B. Tribes Throughout Indian Country Need Authority to Prosecute All Indians Who Commit Crimes Within Their Indian Communities And Are Well-Suited To Exercise Such Authority	8
1. On-Reservation Crime is a Serious Problem Throughout Indian Country	9
2. From their Historical Roots, Modern Tribal Courts Have Made Great Progress	12

TABLE OF CONTENTS—Continued

	Page
3. Congress Has Recognized that Tribal Courts Are Well-Suited to Enforcing Criminal Laws and Protecting Tribal Communities	15
II. SECTION 1301 OF THE ICRA PROPERLY ADDRESSES THE JURISDICTIONAL VOID CREATED BY THE *DURO* DECISION AND RECOGNIZES THAT TRIBES HISTORICALLY EXERCISED INHERENT CRIMINAL JURISDICTION	17
A. The Jurisdictional Void Created by the *Duro* Decision Caused A Serious Crisis in Law Enforcement on Indian Reservations	17
1. Duro Created a Jurisdictional Void	17
2. The Vacuum Extended Even to Major Crimes	20
3. Congress was Asked by Many Law Enforcement Agencies at All Levels to Take Action	20
B. Congress Reviewed the Historical Record and, Contrary to the Court's Decision in *Duro*, Recognized and Affirmed the Inherent Powers of Indian Tribes	22
C. Subsequent Analysis of The Historical Record, Particularly Of The Solicitor's Opinions Relied Upon By the Court In *Duro*, Comports With Congress' Conclusion	24
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

	Page
Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965)	14
Duro v. Reina, 495 U.S. 676 (1990)	*passim*
Ex Parte Crow Dog, 109 U.S. 556 (1883)	23, 24
Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987)	16
United States v. Rogers, 45 U.S. (4. Hou.) 567 (1846)	3, 23
Worcester v. Georgia, 331 U.S. (6 Pet.) 515, 531 (1832)	3

STATUTES AND EXECUTIVE MATERIALS

18 U.S.C. § 1152	18, 24
18 U.S.C. § 1153	18, 20, 24
25 U.S.C. §§ 1301-1341	*passim*
25 U.S.C. § 1302(7)	9
25 U.S.C. § 3601	15
25 U.S.C. § 3601(2)(5)	15
Act of Mar. 3, 1817, 3 Stat. 383	23
Act of June 30, 1834, ch. 161 4 Stat. 733	23
25 C.F.R. 11	14
25 C.F.R. 11.2(a)	14
25 C.F.R. 11.2(c)	14
25 C.F.R. 11.100	14
1 Op. Sol. 445 (October 25, 1934)	25, 26, 27
1 Op. Sol. 699 (November 17, 1936)	28
1 Op. Sol. 736 (March 17, 1937)	28
1 Op. Sol. 849 (August 26, 1938)	28
1 Op. Sol. 859 (October 25, 1938)	29
1 Op. Sol. 872 (February 17, 1939)	29

TABLE OF AUTHORITIES—Continued

Page

TRIBAL CONSTITUTIONS AND LAWS

Spirit Lake Const. art. VI, sec. 4 6
Spirit Lake Tribal Court, Statement of Rights..... 7
Spirit Lake Tribal Resolution, No. A05-00-239 (Sept.22, 2000) 5

LEGISLATIVE MATERIALS

S. Rep. No. 102-153 (1991)..... 24
S. Rep. No. 102-168 (1991)..... *passim*
H.R. Rep. No. 102-61 (1991) 11, 12, 19, 23
Conf. Rep. No. 102-261 (1991)..... 24
Impact of Supreme Court's Ruling in Duro v. Reina: Hearing Before the Senate Select Comm. on Indian Affairs, 102nd Cong., Pt. 2 (1991).....18, 19, 20
Senate Committee on Indian Affairs Hearing on the Reauthorization of the Indian Child Protection and Family Violence Prevention Act, S. 1601 (Sept. 24, 2003) 10
Status of Jurisdictional Authority in Indian Country, An Assessment of Emerging Issues: Hearing Before the Senate Select Comm. on Indian Affairs, 102nd Cong. At 39-40..... 19
Statement of Sen. Inouye, Cong. Rec. S5223 (Apr. 25, 1991) 16

MISCELLANEOUS

U.S. Department of Justice, Bureau of Justice Statistics, *American Indians and Crime*, NCJ 173386 (Feb. 1999)..... 9
U.S. Department of Justice, Bureau of Justice Statistics, *Tribal Law Enforcement 2000*, NCJ 197936 (Jan. 2003, revised 4/29/03) 10

TABLE OF AUTHORITIES—Continued

Page

U.S. Department of Justice, Policing on American Indian Reservations, A Report to the National Institute of Justice, NCJ 188095 (Jul. 2000)..... 9
Report of the Executive Committee for Indian Country Law Enforcement Improvements, Final Report to the Attorney General and the Secretary of the Interior (Oct. 31, 1997) 9, 10
Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey research report, NCJ 181867 (2000) 10
Survey of Tribal Justice Systems and Courts of Indian Offenses, May 2000, Prepared by the American Indian Law Center 12
Aline K. Major and Arlen Egley, Jr., 2000 Survey of Youth Gangs in Indian Country, National Youth Gang Center (NYGC) Fact Sheet (June 2002) 11
Felix S. Cohen, Handbook of Federal Indian Law (1982 ed.)..... 14, 15
Elizabeth A. Harvey, The Aftermath of *Duro v. Reina*: A Congressional Attempt to Reaffirm Tribal Sovereignty Through Criminal Jurisdiction over Nonmember Indians, 8 T.M. COOLEY L. REV. 573 (1991)..... 25
William R. Quinn, Intertribal Integration: The Ethnological Argument in *Duro v. Reina* ETHNOHISTORY 40:I, Winter 1993..... 25

INTEREST OF *AMICI CURIAE* [1]

Amici are the Spirit Lake Sioux Tribe of North Dakota (the situs of the instant case) and the following eighteen tribes:

> Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation of Montana, Confederated Tribes of the Warm Springs Reservation of Oregon, Eastern Band of Cherokee Indians of North Carolina, Lac Courte Oreilles Tribe of Wisconsin, Lummi Nation of Washington, Menominee Tribe of Wisconsin, Metlakatla Indian Community of Alaska, Mississippi Band of Choctaw Indians, Mohegan Tribe of Connecticut, Nez Perce Tribe of Idaho, Oglala Sioux Tribe of South Dakota, Pascua Yaqui Tribe of Arizona, Pawnee Nation of Oklahoma, Pueblo of Laguna of New Mexico, Pueblo of Santa Clara of New Mexico, Salt River Pima-Maricopa Indian Community of Arizona, and the Three Affiliated Tribes of the Fort Berthold Reservation of North Dakota.

All amici tribes have inherent criminal jurisdiction over all Indians, regardless of tribal affiliation, who violate tribal law within their reservations as explicitly recognized and affirmed by the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, as amended. As Section 1301 is the central subject of this litigation, and its meaning, reach and scope are likely to be determined by this Court, amici have a substantial interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tribal governments throughout the Nation are responsible for the peace and safety of their reservation communities, just as the Spirit Lake Tribe was—the Tribe which prosecuted

---

[1] Petitioner and Respondent have consented to the filing of this Brief, and their consents are filed herewith. No counsel for a party authored this brief in whole or in part. No person or entity, other than Amici, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

Billy Jo Lara in this case. As at Spirit Lake, most of the residents in Indian communities are tribal members, but in each community there are some Indians from other tribes. These Indians choose to live as a part of other tribes' Indian communities for various reasons—marriage or relationships with tribal members, employment on the reservation, or otherwise.

When these Indians commit minor offenses in their communities, the tribe in charge of that community is often the only entity with the legal authority and the resources to deal with these offenders. Federal authorities generally lack jurisdiction over misdemeanor crimes by Indians on Indian reservations, and the large majority of states lack jurisdiction over all crimes committed by Indians on Indian reservations. And even when the federal government or the states do have jurisdiction over such misdemeanor crimes committed by Indians on Indian reservations, they often lack the resources and/or incentive to respond to them.

Legal technicalities aside, if anyone is going to deal with minor offenses committed by the Indians living in their communities, there is no practical or better alternative but the tribes. Tribes are the best alternative in that they have a special responsibility for peace on the reservation, are closest to the scene of the crimes, and often know the people involved. Also, thanks to major assistance from a variety of congressional programs, tribes have acquired capable and up-to-date judicial systems. Like the Spirit Lake Tribe, many have criminal codes, police forces, prosecutors, and judicial systems. Their misdemeanor codes are usually similar to those of the surrounding states and municipalities. Prosecutions are subject to the constitutional rules extended by the Indian Civil Rights Act to Indian courts, and some tribes go even beyond that, for example by furnishing free counsel to indigent defendants.

Amici believe that tribal jurisdiction to keep the peace in their communities is appropriate for the benefit of all members of the community—and urge this Court to confirm Congress' actions recognizing that tribes retain their inherent jurisdiction over non-member Indians, a power they historically had until this Court's 1990 decision in *Duro v. Reina*, 495 U.S. 676 (1990).

In *Duro*, this Court held that tribes had lost their jurisdiction over non-member Indians,[2] mainly because Congress had never recognized it. After the decision, Congress proceeded to expressly recognize it by amending the Indian Civil Rights Act of 1968 to affirm tribes' inherent criminal jurisdiction over all Indians (the "ICRA Amendment"). One question here is whether Congress had the constitutional power to do so. Both the United States and amicus National Congress of American Indians demonstrate that they did. We support these arguments and do not repeat them here.

What we do address are the following points, which we hope the Court will find helpful in its analysis of the issues. First, we recite the full set of facts of what happened on the Spirit Lake Reservation to illustrate the seriousness of the problem of on reservation crime and the need for the tribal government to deal with it. Second, we show that with federal assistance, tribal law enforcement systems are making great strides in capability. Third, we show the flood of compelling evidence Congress had before it when it affirmed tribes' inherent misdemeanor jurisdiction over all Indians, including evidence of the law and order crisis that occurred on reservations in the wake of the *Duro* decision. This evidence persuaded the Justice Department to support the

---

[2] In this brief, the term "non-member Indian" is used guardedly because, historically, Indian reservations were tribal communities whose members included all Indians. *Worcester v. Georgia*, 331 U.S. (6 Pet.) 515, 531 (1832); *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846). Historically, tribal membership was not defined by a stiff and formal enrollment standard.

ICRA Amendment, as did many Western states with large Indian populations and law enforcement groups. We also review the historical record before Congress, based on which it arrived at a different conclusion than the Court's in *Duro*. Finally, we review the five Interior Solicitor's Opinions, which this Court concluded in *Duro* were ambivalent, and suggest that this Court reconsider them. The 1934 Solicitor Opinion, *The Power of Indian Tribes*, is clear that tribes have always had jurisdiction over non-member Indians enrolled elsewhere, and the four minor ones are not inconsistent with that.

Taken as a whole, the legislative record amply justifies Congress' decision to "recognize and affirm" the inherent right of tribes to exercise criminal jurisdiction over all Indians.

ARGUMENT

I. SECTION 1301 OF THE INDIAN CIVIL RIGHTS ACT PROPERLY RECOGNIZES THAT INDIAN TRIBES ARE THE LAWFUL AND MOST APPROPRIATE AUTHORITIES TO HANDLE MISDEMEANOR OFFENSES COMMITTED BY ALL INDIANS ON THEIR RESERVATIONS

A. The Facts of This Case Demonstrate Why the Spirit Lake Tribe Needs to Exercise Inherent Criminal Jurisdiction Over All Indians Who Commit Misdemeanors on its Reservation

Billy Jo Lara, an enrolled member of the Turtle Mountain Band of Chippewa Indians of North Dakota, chose to become a member of the Spirit Lake Tribe's community in North Dakota. He married an enrolled member of the Spirit Lake Tribe, moved onto the Reservation, and fathered at least two children who are also enrolled members of the Spirit Lake Tribe. As an Indian member of the Spirit Lake tribal

community, Mr. Lara was provided with a multitude of opportunities and services available to all Indians, such as health services, housing, commodities, job services, and many others.

Unfortunately Mr. Lara was not a model citizen of the Spirit Lake tribal community. As tribal court records show, Mr. Lara began causing trouble in the community as early as 1999. From that time on, these records show, Mr. Lara has repeatedly committed offenses of domestic abuse, public intoxication, and resisting arrest. According to his wife's testimony, his threats and violence against her reached such a point that she eventually had to flee the Reservation and seek safety in an out-of-state shelter. In order to protect the tribal community, the Tribe turned to the federal government to ask for help with Mr. Lara, but the federal government refused to prosecute him.

In response, the Tribal Council turned to one of its most extreme remedies—exclusion. On September 22, 2000, after hearing and testimony, the Spirit Lake Tribal Council passed a Resolution ordering the removal and exclusion of Mr. Lara from the Spirit Lake Reservation. *Spirit Lake Tribal Resolution*, No. A05-00-239 (Sept.22, 2000).

This Court has approved the exclusion power as an appropriate remedy for tribes. *See Duro v. Reina*, 495 U.S. 676, 696-97 (1990) ("[t]he tribes also possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands."). As this case shows, however, the exclusion power alone is not a practical way to preserve order among those who live on their reservations.[3]

---

[3] Exclusion is not a simple or rapid remedy. Additionally, exclusion is undesirable because it often unravels the fabric of the community. Among the tribes who responded to a 103 tribe survey commissioned by the National Congress of America Indians in 1991, 89 percent reported they did not feel that exclusion or removal of non-members was a workable solution to the lack of criminal jurisdiction over them because of

Indeed, the very incident bringing Mr. Lara before this Court arose from attempts to enforce a violation of the exclusion order against him.

On the night of June 13, 2001, Mr. Lara violated the exclusion order and entered the Reservation. In response to complaints, police officers were called out. Finding Mr. Lara clearly intoxicated, the responding officers, a tribal police officer and a BIA officer, attempted to arrest him for public intoxication and an outstanding arrest warrant. Struggling against arrest, Mr. Lara struck one of the officers. Once at the police station, officers advised Mr. Lara that there was an exclusion order against him issued by the Spirit Lake Tribe. As the police report shows, Mr. Lara responded to this information by striking the other officer—a blow which left him unconscious.

The Spirit Lake Constitution recognizes the Tribe's inherent authority to "enact ordinances to regulate the conduct and domestic relations of the members of the tribe, *or Indians from other tribes on the Reservation*." Spirit Lake Const. art. VI, sec. 4 (emphasis added). Pursuant to this authority, the Tribe charged Mr. Lara with resisting lawful arrest, public intoxication, and violence to a police officer—all violations under the Spirit Lake Law and Order Code.

On June 15, 2001, after being fully informed of his rights and acknowledging them with his signature, Mr. Lara pleaded guilty in tribal court to all three charges.[4] He was ordered

---

the extent to which non-members had integrated into the Indian community on the reservation. The most common reasons for this were the extensive intermarriage between tribal members and non-members, the large number of nonmember children, and the large number of non-members working on the reservation. S. Rep. No. 102-168, App. E (1991).

[4] Before pleading to any charges, Mr. Lara was advised, in writing, that: "You are not required to say anything or answer any questions and anything that you choose to say may be used against you in a subsequent proceeding. As a defendant, you are presumed innocent and you are entitled to the following rights: 1. The right to be given an explanation of the charges against you. 2. The right to be represented by an attorney of your own choosing at your own in [sic] expense in all subsequent proceedings. 3. You have the right to plead 'Not Guilty.'" He was also advised of the maximum penalties the court could impose (up to 6 months in jail and/or a fine up to $500, and that in the event of a trial he had a right to a jury, the right to testify, and that the prosecution had the burden of proof. Spirit Lake Tribal Court, Statement of Rights, signed and dated 6/15/01 by Billy Lara.

to serve 60 days in detention at the Fort Totten Detention Center for resisting arrest, 5 days for the intoxication charge, and 90 days for violence against the police officer. He was not fined or charged costs. Mr. Lara was also charged with violation of the exclusion order but disposition on that charge was deferred.

Shortly following the tribal convictions, the United States indicted Mr. Lara for his offenses against the BIA officer, a federal employee. Mr. Lara moved to dismiss the federal indictment solely on double jeopardy grounds. Importantly, he does not challenge the tribal court conviction, nor does he raise any claim that it was in any way offensive to his personal liberties.

Since the State had no jurisdiction over him, and the federal authorities declined to take any action at the time, the only authority that could handle this series of incidents was the Spirit Lake Tribe itself. The Tribe, on behalf of the community and Mr. Lara's wife and children, had a right to punish Mr. Lara for his criminal behavior, and did so. This right was properly recognized by Congress in Section 1301 of the Indian Civil Rights Act, which states that the "powers of self-government . . . means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301.

B. Tribes Throughout Indian Country Need Authority To Prosecute All Indians Who Commit Crime Within Their Indian Communities And Are Well-Suited To Exercise Such Authority

The story of Spirit Lake and Billy Jo Lara is typical throughout Indian Country. Like Mr. Lara, Indians often choose to come to other tribes' reservations and live in Indian communities. Indians marry and have children with members of other tribes, they live with parents who are members of other tribes, they find employment on other tribes' reservations and so forth. Indians who choose to move to other tribes' reservations are entitled to receive services provided by those other tribes, and by the federal government, to all Indians regardless of tribal affiliation.

As indicated in a survey of 103 tribes conducted by the National Congress of American Indians in 1991(hereinafter "1991 NCAI Survey"), large numbers of Indians living in reservation Indian communities are not members of the local tribes. *See* S. Rep. No. 102-168, App. E (1991). Of the responding tribes, 80 percent reported that non-member Indians were married to tribal members, 92 percent reported that non-member Indians worked on their reservations, and 25 percent reported that non-member Indians held interests in trust or restricted Indian land on their reservations. *Id.*[5] Inevitably, some of these non-member Indians commit minor crimes in the Indian communities they live or work in. As a practical matter, the only workable jurisdictional authority over these Indians for misdemeanor crimes is the tribes themselves.[6]

---

[5] One of the largest non-member Indian populations is on the Oglala Sioux Reservation in South Dakota. There are 40,873 member Indians on the Reservation, plus about 9,000 non-member Indians, or about 18 percent.

[6] Crimes prosecuted by Indian tribes are referred to as misdemeanor crimes as the Indian Civil Rights Act limits tribal courts to sentences up to one year in jail and/or $5,000 in fines. 25 U.S.C. § 1302(7)(prior to 1986 the limit was 6 months and/or $500).

1. *On-Reservation Crime is a Serious Problem Throughout Indian Country*

Crime is a major problem on Indian reservations. Crime rates among Indians are between two and three times the national rate. U.S. Department of Justice, Bureau of Justice Statistics, *American Indians and Crime*, NCJ 173386 (Feb. 1999) (hereinafter "*American Indians and Crime*"). And it is a problem that is growing:

> "Serious and violent crime is rising significantly in Indian Country—in sharp contrast to national trends . . . . Nationwide, for example, violent crime has declined significantly between 1992 and 1996. The overall violent crime rate has dropped about 17 percent, and homicides are down 22 percent. For the same time period, however, the BIA reports that homicides in Indian country rose sharply . . . . Other violent crimes, such as gang violence, domestic violence, and child abuse have paralleled the rise in homicides."

Report of the Executive Committee for Indian Country Law Enforcement Improvements, *Final Report to the Attorney General and the Secretary of the Interior* (Oct. 31, 1997) (hereinafter, "*Executive Committee Report*").

By far the most common types of criminal activity reported on reservations, according to the 1991 NCAI Survey, were misdemeanor crimes—disorderly conduct, assault/battery, intoxication, and driving while intoxicated.[7] As reports also show, most of these crimes are related either

---

[7] *See also American Indians and Crime* at 3 ("the most common type of violent crime experienced by American Indian victims was simple assault (56%)"); U.S. Department of Justice, Policing on American Indian Reservations, A Report to the National Institute of-Justice, NCJ 188095 at 19 (Jul. 2000) (hereinafter, "*Policing on Reservations*").

directly or indirectly to alcohol. *See* S. Rep. No. 102-168, App. E (1991).[8] Domestic Violence, including child abuse, is also one of the most prevalent of the crimes in Indian country. *See Senate Committee on Indian Affairs Hearing on the Reauthorization of the Indian Child Protection and Family Violence Prevention Act, S. 1601* (Sept. 24, 2003); *see also Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey research report*, NCJ 181867 (2000).[9] Other crimes occurring frequently on-reservation are those involving juveniles. Most significant is gang related activity, which is on the rise.[10]

---

[8] According to one report in 2000, "Alcohol-related offenses were among the most common, including 17,931 liquor law violations, 19, 092 DWI offenses, and 53,297 incidents of drunkenness." U.S. Department of Justice, Bureau of Justice Statistics, *Tribal Law Enforcement 2000*, NCJ 197936 (January 2003, revised 4/29/03).

[9] According to the National Indian Child Welfare Association:

> "[D]ata reported by the National Child Abuse and Neglect Data System (NCANDS) database reveals that Indian children represent 1.6 percent of substantiated child abuse and neglect cases nationwide, yet are only 1 percent of the population (Child Welfare League of America, 1999) . . . . In fiscal year 1997, the Bureau of Indian Affairs reported 9,040 incidents of child abuse and 19,200 incidents of child neglect for Indian children living on tribal lands (U.S. Department of Interior, 1998). The Bureau of Indian Affairs also reported 4,567 incidents of child sexual abuse for tribes in 1997."

Senate Committee on Indian Affairs Hearing on the Reauthorization of the Indian Child Protection and Family Violence Prevention Act, S. 1601 (Sept. 24, 2003). *See also* Executive Committee Report at Tab B ("According to BIA figures, from 1993 to 1995, child sexual abuse is among the top three crimes reported in Indian country").

[10] Twenty-three percent of the tribes responding to a 2000 survey on gangs in Indian Country reported gang activity in their communities and reported that the vast majority (78 percent) of the gang members were Indians. The types of crimes committed most frequently by these gangs included: graffiti (47 percent); vandalism (40 percent); drug sales (22 percent); and aggravated assault (15 percent). Aline K. Major and Arlen Egley, Jr., *2000 Survey of Youth Gangs in Indian Country*, National Youth Gang Center (NYGC) Fact Sheet (June 2002).

The cumulative effect of these types of crimes can be severely disruptive to the peace and comfort of local Indian communities. Federal and state authorities, however, have no jurisdiction over misdemeanors by non-member Indians. Even where they do have jurisdiction over Indians, they very often lack the resources and the inclination to pay attention to them. As Congress recognized:

> "Crowded dockets of U.S. District Courts do not lend themselves to being 'traffic court' for this category of Indian reservation cases. The vast and often remote areas of which some Indian reservations consist make it difficult and expensive to transport defendants, victims, witnesses and law enforcement officers to handle the arraignments, trials and sentences which are required in the prosecution of such minor offenses."

H.R. Rep. No. 102-61, at 3 (1991). Indeed, after the *Duro* decision, tribes were unable to get help from either federal or state authorities for assistance with these types of crimes. In the wake of the *Duro* decision:

> "tribal governments called upon federal and state law enforcement authorities to assist them in assuring that offenders of Federal law would be prosecuted. However, reports soon came to the Congress that U.S. Attorneys, already overburdened with the prosecution of major crimes, could not assume the caseload of criminal misdemeanors referred from tribal courts for prosecution of non-member Indians. In non-Public Law 280 states, tribal governments were told that the state simply has no authority to exercise criminal jurisdiction. Further, tribal governments reported to the Congress that even in those states which had assumed criminal jurisdictional

> authority under Public Law 280, state law enforcement officers refused to exercise jurisdiction over criminal misdemeanors committed by Indians against Indians on reservation lands."

S. Rep. No. 102-168, at 4 (1991).

Even if federal or state authorities were somehow to acquire the jurisdiction or resources to address such minor offenses, tribes would still be the most effective jurisdictional authority to deal with such offenses. As a practical matter, tribes have the greatest incentive—they know the territory and the people, and their presence fosters deterrence and a sense of community pride and responsibility. As Congress noted:

> "Judicial efficiency is not only promoted when the local tribal court can adjudicate such infractions, but the appropriate deterrent effect and greater community awareness are achieved when the administration of justice on this level occurs within the community where the offenses were committed."

H.R. Rep. No. 102-61, at 3 (1991).

2. *From Their Historical Roots, Modern Tribal Courts Have Made Great Progress*

Modern tribal courts are not much in the news, but they have progressed enormously in the past 30 years. A survey conducted in 2000 reported that there were 246 tribal justice systems in existence. *Survey of Tribal Justice Systems and Courts of Indian Offenses*, May 2000, prepared by the American Indian Law Center for the U.S. Department of the Interior, Bureau of Indian Affairs (hereinafter, "*2000 survey*"). [11] Of the tribes responding to the survey, 78 percent

[11] The report indicated that all tribes with populations over 10,000 had tribal justice systems, and that only 31 of the tribes with populations between 1,000 and 10,000 did not have justice systems. The majority of tribes without justice systems were those with populations under 1,000. 2000 Survey at 44.

had written codes defining their reservation's laws. Of these, nearly 72 percent were modern, "Western-style" codes, which adopted federal, state, and municipal laws. *2000 Survey* at 15, 18. While 75 percent of the tribes did have some laws based on Indian custom, such laws were almost universally applied to tribal members only. *Id.* at 15, 19.

Similarly, tribal justice systems are predominantly "Western-style," patterned after state and federal models. *2000 Survey* at 22. Nearly all tribes (95.3 percent) have an appeals process. *2000 Survey* at 23. Regarding parties' rights, nearly 75 percent have a Bill of Rights incorporated into their codes or constitutions. While not required under the Indian Civil Rights Act, many of the tribal court systems provide indigent defendants with defense attorneys or defense advocates, while others require that the judge assure the protection of defendants' rights. *Id.* at 27. In response to the notion that tribal courts are subject to political interference, the survey report states that "[v]ery few justice systems report political interference with the work of the courts, contrary to the widespread impression fostered by the few bad examples." *Id.* at vii.

Beginning in the 1880's, law enforcement against Indians for minor crimes on reservations other than those of tribes that had their own codes and courts, such as the Five Tribes in Oklahoma, was generally pursuant to the Interior Secretary's Courts of Indian Offenses, an important part of the history of criminal law enforcement systems on Indian reservations. These courts were set up by BIA regulations, under the Secretary's general responsibility for Indian

Affairs.[12] The regulations defined the Court of Indian Offenses's jurisdiction as all offenses when committed by any "Indian," within the reservation, and defined "Indian" as "*any* person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction . . . ."[13] In other words, it covered non-member Indians enrolled elsewhere.

Prior to the passage of the Indian Reorganization Act ("IRA") in 1934, Courts of Indian Offenses were mainly instruments of the BIA, but included inherent tribal power. *See Colliflower v. Garland*, 342 F.2d 369, 379 (9th Cir. 1965). After the IRA was enacted, tribes began setting up their own law and order systems, usually patterned after the old Court of Indian Offenses system, which they superseded. *See* Felix S. Cohen, Handbook of Federal Indian Law, 251 (1982 ed.). The BIA then rewrote the Code of Indian Offenses, which, with minor changes, is still in effect. *See* Cohen at 333. This Code, applicable to those tribes that still had Courts of Indian Offenses, restored a large measure of tribal self-determination to tribal governments, gave tribes a voice in the appointment and removal of judges, and encouraged tribes to supercede the Code with their own laws, which today most tribes have done. *See id.* at 251, 333-34.

---

[12] Currently 25 C.F.R. Part 11. These courts were first upheld in 1888, see Felix S. Cohen, Handbook of Federal Indian Law 333 (1982 ed.) (hereinafter "Cohen"). While the validity of Courts of Indian Offenses was later questioned, the fact of repeated congressional appropriations leaves little doubt of their validity. Cohen at 333. Some 45 tribes still have Courts of Indian Offenses. See list in 25 C.F.R. 11.100.

[13] (Emphasis Added) This language appears in the first Code of Federal Regulations, Part 161 (June 30, 1938) (and presumably in earlier regulations going back many years), and the same language was carried forward 25 C.F.R. 11.2(a) and (c) (1993). The quoted clause was dropped in the 1994 edition.

Because they were for the most part patterned after the old Code of Indian Offenses, most current tribal justice systems are based on Anglo-American concepts of civil and criminal law.

> "The Courts of Indian Offenses have had a lasting effect on tribal legal institutions. Almost all tribes have used the BIA code and courts as the starting point for establishing their own courts, police, and written laws. As a result most tribes have courts and codes that are based on Anglo-American concepts of criminal and civil law, separation of powers, and societal rules. For similar reasons many tribal institutions closely resemble one another."

Cohen at 333. Criminal offenses defined in the BIA written Court of Indian Offenses Code, revised in 1935, and in most tribal codes, are the same lesser offenses in any English common law jurisdiction—assault, battery, disorderly conduct, traffic offenses, liquor violations, etc. *Id.*

3. *Congress Has Recognized that Tribal Courts Are Well-Suited to Enforcing Criminal Laws and Protecting Tribal Communities*

Congress has been actively supporting the development of tribal courts. For instance, in 1993, Congress passed the Indian Tribal Justice Act, 25 U.S.C. § 3601, for the purpose of strengthening and improving tribal justice systems. With this Act, one aspect of which authorizes funding for tribal justice systems, Congress expressly recognized that, "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." 25 U.S.C. § 3601(2)(5). Congress also recognized the capabilities of tribal courts when it enacted the ICRA Amendment:

> "The criminal enforcement system of many tribes, including the Ute Tribe of Utah, the Navajo Nation, the Wind River Tribes, the Confederated Salish and

> Kootenai Tribes of the Flathead Reservation, to name but a few, are composed of law-trained and lay counsel and judges, professional and trained police forces, and impartial and capable appellate panels. According to the Ute Tribe: 'until Duro, the tribe was wholly unaware that its court system or its civil rights protections were somewhow [sic] inadequate or insufficient.' In fact, free counsel is provided to indigent defendants by the Ute court and by many tribal courts elsewhere."

Statement of Sen. Inouye, Cong. Rec. S5223 (Apr. 25, 1991).

For tribal courts to exercise criminal misdemeanor jurisdiction over all Indians in their communities regardless of tribal affiliation is consistent with the longstanding federal policy of encouraging self-governance generally, and tribal courts specifically. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987).

In sum, misdemeanor crime is a serious problem on Indian reservations. Leaving this problem for the federal or state authorities to handle is unworkable due to their lack of legal authority, funding, and incentives. Tribes have the incentive and are the logical jurisdictional authority to deal with misdemeanor crime. Modern tribal law enforcement systems are up to the task. Congress correctly recognized these realities in enacting the ICRA Amendments:

> "The action of the Congress reaffirming the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservation is premised upon the reality and practice of reservation life: that non-tribal member Indians own homes and property on reservations, are part of the labor force on the reservation, and frequently are married to tribal members. Non-tribal member Indians receive the benefits of programs and services provided by the tribal government. Their children attend tribal schools, and their families receive health care services in tribal hospitals and clinics. Most Indian reservations are located far

> from urban centers, they are geographically isolated and remote, they are separated from state law enforcement by significant distances. The only practical means of providing an immediate law enforcement response to situations arising on the reservation has consistently been found to be that of tribal or local BIA police, with arraignment in tribal court, and confinement in tribal detention facilities."

S. Rep. No. 102-168, at 7 (1991).

II. SECTION 1301 OF THE INDIAN CIVIL RIGHTS ACT PROPERLY ADDRESSES THE JURISDICTIONAL VOID CREATED BY THE *DURO* DECISION AND RECOGNIZES THAT TRIBES HISTORICALLY EXERCISED INHERENT CRIMINAL JURISDICTION.

A. The Jurisdictional Void Created by the *Duro* Decision Caused A Serious Crisis in Law Enforcement on Indian Reservations

In *Duro v. Reina*, Justice Kennedy recognized that "[i]f the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, *then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.*" *Duro v. Reina*, 495 U.S. 676, 698 (1990) (emphasis added). Almost immediately after the decision in *Duro*, it became apparent that the "present jurisdictional scheme" was woefully "insufficient" to meet the practical needs of law enforcement in tribal communities.

1. *Duro Created a Jurisdictional Void*

The *Duro* decision created a "jurisdictional void" over misdemeanor offenses committed by non-member Indians. The void was the result of states lacking criminal jurisdiction over Indians on the reservation (except in a few P.L. 280 states) and federal authorities' lack of criminal jurisdiction

over minor crimes committed by Indians against other Indians, 18 U.S.C. § 1152, 1153.

In the five months between the *Duro* decision and the ICRA Amendment, many tribes had to stop prosecuting non-member Indians for these offenses. In many cases, non-member Indians detained or incarcerated by Indian tribes for criminal offenses had to be released. In the hearings before the Senate Select Committee on Indian Affairs and the House Interior and Insular Affairs Committee, the Yakima Indian Nation testified that during the five months the *Duro* decision was in effect, tribal law enforcement had to dismiss pending charges against 43 Indians because they were not enrolled members of the Yakima Indian Nation. *Impact of Supreme Court's Ruling in Duro v. Reina: Hearing Before the Senate Select Comm. on Indian Affairs*, 102nd Cong., Pt. 2, at 79 (1991) (testimony of Harry Smiskin, Tribal Council Member, Yakima Indian Nation) (hereinafter "Yakima Testimony).

The Quinault Indian Nation of Washington testified that its tribal law enforcement office was forced to release 12 non-member Indians awaiting prosecution in tribal court for fairly serious offenses when the *Duro* decision came down, and could not prosecute another 32 misdemeanor offenses committed by non-member Indians in the months following the decision.[14] The Confederated Tribe of the Warm Springs Reservation of Oregon testified that in the months following the *Duro* decision, the tribe was faced with a very serious law enforcement problem including the "many instances of drunk

[14] President DeLaCruz testified that the twelve cases dismissed included statutory rape, assault, breaking and entering, and that, to his knowledge, neither the state nor the federal government prosecuted these cases. The thirty-two cases the tribe was unable to prosecute included attempted kidnapping, weapons violations, criminal trespass and assault. *Impact of Supreme Court's Ruling in Duro v. Reina: Hearing Before the Senate Select Comm. on Indian Affairs*, 102nd Cong., Pt. 2 at 151 (1991) (Testimony of Joseph DeLaCruz, President, the Quinault Indian Nation).

driving, assault, theft, and so on, that simply went unpunished."[15] On at least one reservation, non-members realized the tribe had lost its jurisdiction, and openly mocked tribal law enforcement authorities. As the Suquamish tribe testified, in the five months following the Duro decision, "tribal police were openly taunted, and tribal law flaunted, by non-member Indians."[16]

Congress received a flood of such testimony from tribes from all over the country during the hearings it held on the ICRA Amendment:

> "The Committee was inundated with anecdotal accounts describing serious jurisdictional law and order problems resulting from the Court's holding. Non-member Indian perpetrators on reservations could no longer be taken to the most accessible forums. Remote reservations with high rates of intermarriage were facing chaos."

H.R. Rep. No. 102-61, at 4 (1991).

[15] Vice-Chairman Frank testified that neither state nor federal law enforcement could fill the jurisdictional void. Specifically, he testified that the tribe is exempt from Public Law 280 jurisdiction in the state of Oregon and that the U.S. Attorney informed the tribe that his office does not have the resources to prosecute misdemeanor crimes by non-member Indians. *Impact of Supreme Court's Ruling in Duro v. Reina: Hearing Before the Senate Select Comm. on Indian Affairs*, 102nd Cong., Pt. 2 at 156-57 (1991) (Statement of the Confederated Tribes of the Warm Springs Reservation).

[16] *Status of Jurisdictional Authority in Indian Country, an Assessment of Emerging Issues: Hearing Before the Senate Select Comm. on Indian Affairs*, 102nd Cong., at 39-40 (1991) (Prepared statement of Georgia George, Chairperson, Suquamish Indian Tribe). The Tribe also testified that "six cases had to be dismissed because of Duro, and at least one dozen went unprosecuted." And as the Tribe noted, "[a]lthough these were minor crimes, such as driving while intoxicated and simple battery, all had the potential for serious harm to individuals and the community." *Id.* at 40.

2. *The Vacuum Extended Even to Major Crimes*

Jurisdictional problems arose even for major crimes because, although federal authorities have jurisdiction (18 U.S.C. §1153), they frequently lack the incentive to use it. One anecdotal case involved the rape of a Yakima woman by two Indian men—one a tribal member and one a member of another tribe. Yakima Testimony at 79. Because rape is a major crime, the tribe referred the case to the U.S. Attorney under 18 U.S.C. §1153. However, the tribe testified that as in the "vast majority of tribal referrals," the U.S. Attorneys' Office declined to prosecute either individuals. As a result, the tribe could only prosecute the enrolled Yakima tribal member, while the non-member Indian walked away scot-free. *Id.*

The Tribe further testified: "This example is not an exception to the rule but rather far more resembles the rule. The declination rate when an Indian is the victim of a crime is extremely high." *Id.* In the survey conducted by the National Congress of American Indians following the *Duro* decision, the overall rate of declination was 57% in 1988 and 60% in 1989. In addition, 63% of the responding tribes believed that the U.S. Attorney was not doing a good job of prosecuting major crime referrals. S. Rep. No. 102-168, App. E (1991).

3. *Congress Was Asked By Many Law Enforcement Agencies at all Levels to Take Action*

This crisis in law enforcement raised serious concerns for several Western states with large Indian populations. As Congress noted in Senate Report 102-168, submitted by Senator Inouye of the Senate Select Committee on Indian Affairs:

> "Following the Court's ruling in *Duro*, five western state legislatures–Arizona, South Dakota, Nevada, North Dakota, and Montana—enacted measures calling upon the Congress to permanently reaffirm tribal government jurisdiction over non-member Indian [sic] who commit misdemeanor crimes. A sixth state, New Mexico, was unable to obtain final passage before adjournment but a measure did pass the House unanimously and was favorably reported by the New Mexico Senate Judiciary Committee. Over 70 legislators in Oregon sent a letter to the Chairman of the Senate Select Committee on Indian Affairs urging that Congress enact permanent legislation. A summary of the resolution is contained in Appendix B of this report, along with a summary of a resolution enacted by the International Chiefs of Police on two separate occasions."

S. Rep. No. 102-168, at 4(1991).[17] These resolutions from the state legislatures stated that the *Duro* decision had reversed 200 years of law enforcement precedent, upsetting the delicate balance between tribal, state and federal authorities by creating a substantial jurisdictional void in law enforcement in Indian Country.

Equally alarmed by the burgeoning crisis, the United States Department of Justice also testified in support of the ICRA Amendment. Philip Hogen, U.S. Attorney for South Dakota and Chair of the United States Attorneys' Indian Affairs Subcommittee, testified that the *Duro* decision created a "sudden deprivation of long and widely exercised jurisdiction" that had "caused a serious law enforcement problem in Indian country." S. Rep. No. 102-168, at 21-22 (1991). The Department of Justice fully supported "prompt enactment of [the ICRA Amendment] in order to end the confusion over jurisdiction engendered by Duro." *Id.* at 23.

---

[17] The International Association of Chiefs of Police enacted resolutions urging "the U.S. Congress to pass legislation affirming that tribes possess the inherent authority to impose criminal sanctions against all Indians who violate the tribal criminal code within their tribal community." S. Rep. No. 102-168, App. B (1991).

Tribes, state-elected officials, state and federal law enforcement authorities—a chorus of experienced and seasoned voices—all concluded that there was an emergent crisis in law enforcement threatening the safety and well-being of tribal communities throughout Indian country that required Congressional attention. Their testimony was not lost on the Congress. Faced with such overwhelming evidence on the practical effects of this jurisdictional void and the evidence that the tribes had historically exercised this jurisdiction, Congress acted:

> "Confronted with a clear jurisdictional void in law enforcement, and as noted by the dissenting justices in *Duro v. Reina*, because the Congress has never acted to explicitly divest tribal governments of criminal misdemeanor jurisdiction, the Congress responded by enacting an amendment to the Indian Civil Rights Act of 1968 to recognize and reaffirm the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians."

Id. at 4.

B. Congress Reviewed the Historical Record and, Contrary to the Court's Decision in *Duro*, Recognized and Affirmed the Inherent Powers of Indian Tribes

In *Duro v. Reina*, the United States Supreme Court reviewed congressional and administrative provisions and found "at most the tendency of past [federal] Indian policy to treat Indians as an undifferentiated class." 495 U.S. at 690. The Court also found that these "references are not dispositive of a question of tribal power to treat Indians by the same broad classification." *Id.* We respectfully submit that the Court had only a limited view of the historical record of federal Indian policy in this regard and that Congress' view was the more accurate one. After a number of hearings on the issue Congress concluded that the Court's historical

view was inconsistent with 200 years of congressional involvement in the area and the current federal statutory scheme. Furthermore, a re-examination of the Solicitors' Opinions of 1934-1939, which the Court concluded were ambivalent in fact clearly demonstrate that tribes have historically had jurisdiction over all Indians living in their reservation communities.

Congress took issue with the Court's characterization in *Duro* of the history of tribes' exercise of criminal jurisdiction over all Indians, stating that:

> "Until the Supreme Court ruled in the case of Duro, tribal governments had been exercising criminal jurisdiction over all Indian people within their reservation boundaries for well over two hundred years. This exercise of jurisdiction by tribal courts was recognized by the United States and by state governments."

S. Rep. No. 102-168, at 2 (1991). After reviewing the history of its own involvement in this area, Congress recognized that it had never acted to divest tribes of their inherent criminal misdemeanor jurisdiction over all Indians, and had instead taken careful steps to avoid doing so when legislating on the subject. Congress noted that as far back as 1817, when it enacted criminal laws applicable to Indian country in the Indian Country Crimes Act, Act of Mar. 3, 1817, ch. 02, 23 Stat 383, it had disclaimed jurisdiction over crimes "committed by one Indian against another, within any Indian boundary." H.R. Rep. 102-61, at 5 (1991). Congress noted that it had included similar language in the Act of June 30, 1834, ch. 161, 4 Stat. 733, which was subsequently interpreted by the Court in *United States v. Rogers* to apply to Indians as a class, not as members of a tribe. *Id.* Congress also pointed out that the federal jurisdictional exclusion for crimes committed by one Indian against another Indian in the 1834 Act was upheld in this Court's holding in *Ex Parte*

Crow Dog, 109 U.S. 556 (1883), and led to the passage of the Major Crimes Act, 18 U.S.C. § 1153 . *Id.*

Examining the current federal statutory scheme, 18 U.S.C. § 1152 (which specifically exempts Indian on Indian crime from federal jurisdiction) and §1153 (which establishes federal jurisdiction for only major Indian on Indian crimes), Congress concluded that:

> "Congress has never changed its position as to the authority of Indian tribal governments to exercise criminal misdemeanor jurisdiction over non-member Indians and is now reaffirming this inherent authority."

Conf. Rep. No. 102-261, at 4-5 (1991). After considering the history of its own actions in this area, the current federal statutory scheme, and the testimony it heard from tribal leaders and legal scholars over the course of the lengthy hearings it held on the subject, Congress concluded that:

> "[f]rom the perspective of most Indian legal scholars and virtually all tribal leaders, the prevailing view is that if Congress had intended to divest Indian tribal governments of jurisdiction over non-member Indians, it would have explicitly done so. Instead, the assumption in Congress has always been that tribal governments do have such jurisdiction. Federal statutes reflect this view, as Congress has never differentiated between member Indians and non-member Indians."

S. Rep. No. 102-153, at 3 (1991).[18]

C. Subsequent Analysis of the Historical Record, Particularly of the Solicitor's Opinions Relied on by the Court in *Duro*, Comports With Congress' Conclusion

The *Duro* Court references five Solicitor opinions which it deemed the "most specific historical evidence on the question" of whether inherent tribal criminal jurisdiction extends

[18] On this point, the record adopts wholesale the characterization of the dissent in *Duro* as proper. *See* Conf. Rep. No. 102-261, at 3-4 (1991).

to Indians who are not members of the tribe. 495 U.S. at 692. However, with all respect, this "specific historical evidence" seems to support what Congress understood—that tribes had not in any way been divested by Congress of their criminal jurisdiction over all Indians on their reservations.[19]

Four months after the passage of the IRA by Congress, Solicitor Margold issued, and Assistant Secretary Oscar L. Chapman approved, the Department of the Interior's seminal legal opinion entitled the *Powers of Indian Tribes*, 1 Op. Sol. 445 (Oct. 25, 1934) (hereinafter the "1934 Solicitor Opinion").[20] In *Duro*, the Court characterized the 1934 Solicitor Opinion as only speaking "in broad terms of jurisdiction over Indians generally." 495 U.S. at 691. Actually, this remarkable 89-page legal opinion lays the foundational principles underlying present-day federal Indian law and policy, including the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians on their reservations.

Equally important, the 1934 Solicitor Opinion is based on an exhaustive review of the historical record—existing statutes, reported case law and written opinions of executive agencies—and constitutes a formal definitive statement of the Department of the Interior's official legal position in relation to the inherent powers of Indian tribes. The 1934 Solicitor Opinion first states the general rule:

> "It is illuminating to deal with the question of tribal jurisdiction as we have dealt with other questions of tribal authority, by asking, first, what the original

[19] *See* Elizabeth A. Harvey, *The Aftermath of Duro v. Reina: A Congressional Attempt to Reaffirm Tribal Sovereignty Through Criminal Jurisdiction over Nonmember Indians*, 8 T.M. COOLEY L. REV. 573 (1991); William R. Quinn, *Intertribal Integration: The Ethnological Argument in Duro v. Reina*, ETHNOHISTORY 40:I, Winter 1993 at 34-69.

[20] 55 I.D. 14, 1 Opinions of the Solicitor Department of the Interior Relating to Indian Affairs 1917-1974 (Op.Sol.) pp. 445-477 (Oct. 25, 1934). This citation is a reprint of the original opinion which is 89 pages in length and is referenced as M-27781.

sovereign powers of the tribes were, and then, how far and in what respects these powers have been limited.

> "So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. *Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.*"[21]

1 Op.Sol. At 471-472 (emphasis added).

The Solicitor then examines how federal jurisdiction coincided with tribal jurisdiction. The Opinion looked first to the basic provision of federal law which extended the general laws of the United States regarding the punishment of crimes committed in Indian country—the Indian Country Crimes Act. The Opinion notes that the Act contains the following important exception for:

> ". . . crimes committed by one Indian against the person or property of another Indian, [or] any Indian . . . committing any offense in the Indian country who has been punished by the local law of the tribe . . . ."

Id. at 472. In analyzing the scope of the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians on their reservations in relation to the Indian Country Crimes Act, the Solicitor unequivocally states: "These provisions recognize that, with respect to crimes committed by one Indian against the person or property of another Indian, *the jurisdiction of the Indian tribe is plenary.*" *Id.* (emphasis added).

---

[21] A conclusion that was echoed in the Secretary's regulations for the Courts of Indian Offenses, *see* supra n.13.

In examining the circumstances following the passage of the Major Crimes Act and the continuing limitations of federal criminal jurisdiction in Indian country, the Solicitor found:

> "The difficulties of this situation have prompted agitation for the extension of Federal or State laws over the Indian country, which has continued for at least five decades, without success. The propriety of the object sought is not here in question, but the agitation itself is evidence of the large area of human conduct which must be left in anarchy if it be held that tribal authority to deal with such conduct has disappeared.
>
> "Fortunately, such tribal authority has been repeatedly recognized by the courts, and although it has not been actually exercised always and in all tribes, it remains a proper legal basis for the tribal administration of justice wherever an Indian tribe desires to make use of its legal powers."

Id. at 474. Clearly, the 1934 Solicitor Opinion is much more that an opinion which speaks only "in broad terms of jurisdiction over Indians generally." To the contrary, the 1934 Solicitor Opinion provides the specific historical background and the specific legal framework for understanding the inherent powers of Indian tribes, which the Solicitor found included the inherent power of Indian tribes to exercise criminal jurisdiction over Indians enrolled on other reservations.

The remaining four Solicitor opinions relied upon by the *Duro* Court are short, fact-specific opinions concerning the exercise of criminal authority by a particular tribe or group of tribes and lend little support to a conclusion that Indian tribes lack criminal jurisdiction over non-member Indians, a conclusion that would be contrary to the 1934 Solicitor Opinion, and also to the jurisdiction spelled out in the Code of Federal Regulations for the Interior Department-created Court of Indian Offenses. *See supra* n.13.

First, there is the 2-page 1936 Solicitor opinion which, in the words of the Court: "flatly declares that '[i]nherent rights of self government may be invoked to justify punishment of members of the tribe but not of nonmembers.'" 495 U.S. at 691, citing 1 Op. Sol. 699 (Nov. 17, 1936). However, the trespassers in that case were *non-Indians*. The Solicitor stated, "There is no question but that ordinances providing for the removal of *non-Indian* trespassers and for the seizure of game unlawfully taken from Indian lands should be approved . . . . On the other hand, ordinances providing for the confiscation of firearms involve delicate questions of law and administration." 1 Op.Sol. at 700 (emphasis added). There was no reason for him to have non-member *Indians* in mind when he used the term "non members." In those days, "non-member" could easily have been used interchangeably with "non-Indians" when the context did not require precision.

The 2-page 1937 Solicitor's Opinion concerned a tribal ordinance under the law and order codes of the Confederated Salish and Kootenai Tribes, which defined the term "Indian" to be "any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction." 1 Op. Sol. 736 (Mar. 17, 1937). The ordinance was not approved by the Secretary, but only because it did not comport with the tribal constitution. The Solicitor found that the Tribes' constitution only authorized the Tribal Council to enact ordinances governing the conduct of *members* of the Confederated Tribes. As Justice Kennedy said in *Duro*, 495 U.S. at 691, this indicates that the Tribe would have had the jurisdiction merely by amending the constitution.

The final two Solicitor opinions are likewise not on point. The one-page 1938 Solicitor opinion, 1 Op.Sol. 849 (Aug. 26, 1938), addressed the question of tribal court jurisdiction over persons who are "non-ward Indians" on the Rocky Boy's Reservation, while the 1939 Solicitor opinion addressed the question of tribal criminal jurisdiction over "unaffiliated Indians" on the Rocky Boy's and Blackfeet Indian Reservations. 1 Op.Sol. 872 (Feb. 17, 1939).[22]

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Respectfully submitted

TRACY LABIN *
RICHARD GUEST
NATIVE AMERICAN RIGHTS FUND
1712 N STREET, N.W.
WASHINGTON, DC 20036
(202) 785-4166

CHARLES A. HOBBS
ELLIOTT A. MILHOLLIN
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W.
Washington, D.C. 20037
(202) 822-8282

Counsel for Amici Lac Courte Oreilles Tribe, Menominee Tribe, Metlakatla Indian Community, Mississippi Band of Choctaw Indians, Oglala Sioux Tribe, Three Affiliated Tribes of the Fort Berthold Reservation

* Counsel of Record for all *Amici*

November 14, 2003

---

[22] *See also* 1 Op. Sol. 859 (October 25, 1938). This Solicitor opinion is not mentioned by the Court and is titled *Applicability of Law and Order Codes to Non-Member Indians on Blackfeet and Rocky Boy's Reservation.* This Solicitor opinion flatly declares that "Indians who are members of other recognized tribes are not subject to the [state] laws, at least with respect to activities on the [Reservation] which do not affect non-Indians." Once again, the tribal law and order codes at issue were limited by the tribal constitution which restricted enforcement of ordinances against members of the tribe only. This Solicitor opinion expressly recognized the gap created in law enforcement as the result.